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No. 79-1359

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD U. WEST, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitior General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of the decisions below enforcing three internal revenue summonses requiring separate financial institutions to produce their business records relating to petitioner's accounts and enforcing a fourth summons requiring petitioner's putative employer, Income Realty and Mortgage, Inc. (Income Realty), to turn over certain of its records pertaining to petitioner's employment.

The petition for a writ of certiorari was filed out of time with respect to the three internal revenue summonses requiring the production of bank records.[1]

The pertinent facts with respect to the summons served upon Income Realty may be summarized as follows: On March 22, 1978, Special Agent Nick DiFalco of the Internal Revenue Service issued a summons to Income Realty, a real estate firm, to produce records and give testimony pertaining to petitioner's tax liabilities for the period 1973-1976. The summons requested petitioner's employment application and resume, IRS Forms W-2, W-4 and 1099, payroll ledger cards, and all cancelled checks payable to or on behalf of petitioner. At petitioner's request, the real estate firm refused to comply (Pet. App. 11).

Following Income Realty's refusal to comply, the government and Special Agent DiFalco commenced this summons enforcement proceeding in the United States District Court for the District of Colorado. In an affidavit filed with the district court, Special Agent DiFalco stated that he was conducting an investigation to ascertain the correct income tax liabilities of petitioner; that the records

[1]The judgment of the court of appeals was entered in all four cases on October 22, 1979, and an order of the court of appeals denying a petition for rehearing in No. 78-2036 (Income Realty) was entered on November 26, 1979 (Pet. App. 14). However, no petition for rehearing was filed by petitioner in Nos. 78-2048, 78-2049 and 78-2050, and no extension of time for filing a petition for a writ of certiorari was obtained. The 90-day period specified by 28 U.S.C. 2101(c) for seeking certiorari in these three civil cases therefore expired on January 20, 1980 (a Sunday). However, the petition for a writ of certiorari was not filed until February 25, 1980. It is therefore out of time with respect to Nos. 78-2048, 78-2049 and 78-2050.

were necessary for a determination of those liabilities; and that summoned records were not in his possession and had not been examined by him (R. 1-8).[2] At an evidentiary hearing held by the district court, petitioner sought to intervene in the proceedings, contending that the summons was issued in bad faith (II-Tr. 98-102).

The district court found that the government had established a prima facie case for the enforcement of the summons and that petitioner had not presented any facts showing harassment or bad faith (Pet. App. 27). After further finding that Income Realty was not a "third-party recordkeeper" within the meaning of 26 U.S.C. 7609 and that petitioner had no proprietary interest in the employment records sought to be produced, the district court denied petitioner's motion to intervene in the proceeding pertaining to Income Realty and ordered the summons enforced (Pet. App. 18-19). The court of appeals affirmed (Pet. App. 9-13).

1. The decision below correctly enforced the third-party summons directing the production of employment records. This Court has consistently held that the government need only make a prima facie showing that it is entitled to enforcement and that such a showing shifts the burden of proving that the summons was issued for an improper purpose to the party opposing enforcement. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48 (1964); *Donaldson* v. *United States*, 400 U.S. 517 (1971); *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

[2]"R." refers to the original record on appeal filed with the court of appeals. "I-Tr." and "II-Tr." refer to the transcript of the district court proceedings.

Moreover, the party challenging a summons bears the burden of proving that the Internal Revenue Service has abandoned its institutional responsibility to collect taxes and civil fraud penalties. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 314-317. Here, the district court expressly found that the government had established the requirements necessary for the enforcement of the summons under *United States* v. *Powell*, *supra*; that any chance of criminal prosecution of petitioner was "incidental and collateral" to the principal civil purpose of the investigation; and that there was "no evidence at all" of any purpose on the part of Agent DiFalco, his supervisor, or the Internal Revenue Service "adversely reflecting in any way on the good faith of the investigation" (Pet. App. 23, 27). In these circumstances, the courts below properly enforced the summons. As the district court noted (Pet. App. 26-27), petitioner failed to allege any facts that would if proved, have met his burden of disproving the actual existence of the Internal Revenue Service's purpose to conduct a valid civil tax determination. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316.

2. There is no basis for petitioner's attack (Pet. 4-6) on the constitutionality of 26 U.S.C. 7602. This Court has repeatedly upheld the statute as consistent with the Fourth and Fifth Amendments where, as here, the summons was issued in good faith and prior to a recommendation for criminal prosecution. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); *Justice* v. *United States*, 390 U.S. 199 (1968), aff'g 274 F. Supp. 283 (E.D. Ky. 1967); *Donaldson* v. *United States*, *supra*; *United States* v. *LaSalle National Bank*, *supra*.

Petitioner argues (Pet. 4) that the result below impairs his opportunity to assert his Fifth Amendment right against self-incrimination. But the Fifth Amendment privilege is a personal one and the papers and effects which the privilege protects must be the private property of the person claiming the privilege, not that of a third party. *Fisher* v. *United States*, 425 U.S. 391 (1976); *Couch* v. *United States*, 409 U.S. 322, 327-328 (1973); *Bellis* v. *United States*, 417 U.S. 85, 89-90 (1974); *Donaldson* v. *United States*, *supra*, 400 U.S. at 523; *United States* v. *White*, 322 U.S. 694, 698-699 (1944).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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